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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

FINJAN, LLC, a Delaware Limited Liability Company,

Plaintiff,

V.

SONICWALL INC., a Delaware Corporation.

Defendant.

Case No.: 5:17-cv-04467-BLF-VKD

**DEFENDANT SONICWALL INC.'S
MOTION IN LIMINE TO EXCLUDE THE
TESTIMONY OF DR. MCDUFF'S PRICE
PER SCAN OPINIONS (METHOD NO. 3)
(MOTION IN LIMINE NO. 4)**

Date: March 18, 2021
Time: 1:30 PM
Courtroom: 3, 5th Floor
Judge: Hon. Beth Labson Freeman

REDACTED

TABLE OF REFERENCED EXHIBITS¹

September 4, 2020 Expert Report of DeForest McDuff, Ph.D	Ex. 1
Order on Daubert Motions [Re: ECF 421, 423, 425, 427, 429, 431], <i>Finjan, Inc. v. Cisco Systems, Inc.</i> , Case No. 17-cv-00072-BLF, Dkt. No. 555 (N.D. Cal. Apr. 21, 2020)	Ex. 2
September 3, 2020 Expert Report of Dr. Aaron Striegel	Ex. 6
November 3, 2020 Deposition Transcript of Aaron Striegel, Ph.D.	Ex. 9
November 2, 2020 Deposition Transcript of DeForest McDuff, Ph.D.	Ex. 10
Marker Advisors, LLC document marked as McDuff Deposition Ex. No. 5	Ex. 13
Agreement for VirusTotal Services, bearing bates numbers SonicWall-Finjan_00101991 - SonicWall-Finjan_00101996, marked as Striegel Deposition Ex. No. 2	Ex. 22
Agreement for VirusTotal Services, bearing bates numbers FINJAN-SW 158696 - FINJAN-SW 158701, marked as Striegel Deposition Ex. No. 3	Ex. 23
January 8, 2017 Email, bearing bates numbers Finjan-SW 403972 - Finjan-SW 403972	Ex. 24
February 27, 2020 Deposition Transcript of Julie Mar-Spinola	Ex. 25
September 7, 2016 Transcript of Proceedings, <i>Finjan, Inc. v. Sophos, Inc.</i> , Case No. C 14-1197 WHO (N.D. Cal.), bearing bates numbers FINJAN-SW158070 - FINJAN-SW158104	Ex. 26
2018 SonicWall Cyber Threat Report, bearing bates numbers FINJAN-SW 433167 – FINJAN-SW 433191, marked as McDuff Deposition Ex. No. 4	Ex. 27
October 9, 2020 Expert Report of Stephen L. Becker, Ph.D. on Behalf of Defendant	Ex. 28

¹All exhibits are attached to the Declaration of Jarrad M. Gunther.

Pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), SonicWall seeks to exclude Finjan's damages expert, Dr. McDuff, from presenting his Method 3 (Price-Per-Scan) reasonable royalty opinions. For Method 3, Dr. McDuff looked to "the number of accused scans multiplied by an appropriate royalty per scan." Ex. 1 (McDuff Report) ¶ 150. Because the manner in which he derived both his "royalty per scan" and the "number of accused scans" are methodologically flawed and without basis in the facts, this methodology should be excluded.

A. Legal Standard

The Court is well-familiar with the general legal standard governing admission of expert opinion and, therefore, SonicWall will not repeat it here. *See, e.g.*, Ex. 2 (Cisco *Daubert* Order), at 1-2; *see also Commonwealth Sci. & Indus. Research Organisation v. Cisco Sys., Inc.*, 809 F.3d 1295, 1302 (Fed. Cir. 2015) ("CSIRO") ("Where the data used is not sufficiently tied to the facts of the case,' a damages model cannot meet the 'substantive statutory requirement of apportionment of royalty damages to the invention's value.'") (quoting *Summit 6, LLC v. Samsung Elecs. Co., Ltd.*, 802 F.3d 1283, 1296 (Fed. Cir. 2015)).

B. Dr. McDuff's Royalty Rate of [REDACTED] Per Scan Relies On Dr. Striegel's Flawed Analysis of the [REDACTED] Agreements

Dr. McDuff opines that "[REDACTED]" and claims that this amount is supported by the "[REDACTED]" [REDACTED] " and "[REDACTED]" [REDACTED]. Ex. 1 ¶ 154 (emphasis added). Dr. McDuff's conclusions are based entirely on Dr. Striegel's separate, flawed analysis of Finjan and SonicWall's [REDACTED] licenses. Ex. 10 at 147:1-6.

Specifically, Dr. Striegel opined that "[REDACTED]" [REDACTED], and also that [REDACTED] [REDACTED]. Ex. 6 ¶ 126. Dr. McDuff's [REDACTED]/scan calculation is based on the price for "[REDACTED]." Ex. 1 ¶ 154 n. 347. But the actual record evidence confirms that neither SonicWall nor Finjan ever paid for, or even obtained a license to, [REDACTED]. Instead,

1 they both purchased and obtained a license to a completely *separate and distinct* [REDACTED] service
 2 – “[REDACTED]” – which both Drs. Striegel and McDuff admit was priced at [REDACTED]
 3 [REDACTED] or less per look-up (*i.e.*, [REDACTED] scan figure that Dr. McDuff uses for his Method 3
 4 royalty rate). Ex. 9 at 33:23-40:18, 41:20-22; Ex. 22; Ex. 23; Ex. 10 at 159:9-163:17. Put simply,
 5 Dr. Striegel was just plain wrong in opining that either Finjan or SonicWall had a license to [REDACTED]
 6 [REDACTED]. And by relying on the higher [REDACTED] pricing (instead of the
 7 much lower pricing for [REDACTED] service that SonicWall and Finjan actually
 8 licensed), Dr. McDuff calculated a royalty rate that was over-inflated by at least 16X, improperly
 9 skewing the damages range. Because his royalty rate analysis is not tied to the facts of record, Dr.
 10 McDuff’s per scan royalty rate is flawed, and his opinions regarding this method must be excluded.
 11 See *CSIRO*, 809 F.3d at 1302 (“[A]s damages models are fact-dependent, a distinct but integral part
 12 of the admissibility inquiry is whether the data utilized in the methodology is sufficiently tied to the
 13 facts of the case.”).

14 Nor would it be acceptable for Dr. McDuff to simply maintain his use of the price of the
 15 [REDACTED] service even though it was never used by either party. To be clear, in
 16 determining the royalty rate to apply to this method, Dr. McDuff relied heavily on his understanding
 17 that the [REDACTED] figure was consistent with “[REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]” Ex. 1 ¶ 154(b), (c). Absent the threshold relevance of both parties subscribing to and
 21 licensing the technology there is no reason for Dr. McDuff to have chosen the pricing for this service
 22 as relevant to the hypothetical negotiation. In fact, it is used by neither, and therefore there is no
 23 reason that it would have been considered at the hypothetical negotiation and Finjan has failed to
 24 provide the requisite technical and economic relevance to be considered here, warranting exclusion.
 25 *Wordtech Sys, Inc. v. Integrated networks Solutions, Inc.*, 609 F.3d 1308, 1319-20 (Fed. Cir. 2010)
 26 (“[C]omparisons of past patent licenses to the infringement must account for ‘the technological and
 27 economic differences between them.’”) (quoting *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 870
 28 (Fed. Cir. 2010)).

1 Although Dr. McDuff briefly mentions other alleged bases of support, none could possibly
 2 provide a methodologically sound basis for use of this royalty rate here. First, he references otherwise
 3 undocumented discussions with Mr. Hartstein and Ms. Mar-Spinola saying that they used [REDACTED]/scan
 4 in negotiations with “[REDACTED].” Ex. 1 ¶ 154 & n. 346. As to Sophos, the final settlement
 5 itself says nothing at all about a price per scan, and contemporaneous emails between Sophos and
 6 Finjan confirm that [REDACTED] either. *See, e.g.*, Ex. 24
 7 (offering terms “[REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]” Ex. 1 ¶ 45(b). The “others” are never identified and thus cannot be a basis for an analysis
 11 of technical or economic comparability, especially in view of Ms. Mar-Spinola’s testimony that
 12 Finjan does not have “a standard pricing” and instead “[i]t’s all dependent on the prospect.” Ex. 25
 13 at 57:18-58:5. Nor do any of Finjan’s other licenses reflect any price per scan rate, much less a
 14 [REDACTED]/scan rate. *Id.* at 55:6-11 (confirming that “[REDACTED]
 15 [REDACTED]). In short, there is no basis to even begin an
 16 analysis of economic or technical comparability from these data points; indeed, it is even worse than
 17 the “starting point” rejected by the Federal Circuit in *Finjan, Inc. v. Blue Coat Sys., Inc.*, 879 F.3d
 18 1299, 1312 (Fed. Cir. 2018), as there is nothing tying a [REDACTED] to what the parties
 19 would have used at the hypothetical negotiation in the 2012-2014 period. *See id.* (“Mr. Chaperot’s
 20 testimony that an 8–16% royalty rate would be the *current starting point* in licensing negotiations
 21 says little about what the parties would have proposed or agreed to in a hypothetical arm’s length
 22 negotiation in 2008.”).

23 Dr. McDuff also references Mr. Hartstein’s testimony from the *Sophos* case (Ex. 1 at n. 346,
 24 citing Finjan-SW 158070, at -85 (Ex. 26)), but the cited testimony is clearly discussing the *Blue Coat*
 25 *I* jury verdict, which had nothing to do with a price per scan, and in any event, was overturned on
 26 appeal after the Federal Circuit found that Finjan’s testimony used figures that were “plucked from
 27 thin air and, as such, cannot be the basis for a reasonable royalty calculation.” *Blue Coat*, 879 F.3d
 28 at 1312. This level of *ipse dixit* cannot sustain a methodology that would increase damages by an

1 order of magnitude. *See DSU Med. Corp. v. JMS Co.*, 296 F. Supp. 2d 1140, 1158 (N.D. Cal.
 2 2003), *aff'd*, 471 F.3d 1293 (Fed. Cir. 2006) ("Picking this million dollar number is
 3 classic ipse dixit and would remain so even if Dr. Degnan were to now essay an expansion of his
 4 reconstruction of the market.").

5 **C. Dr. McDuff's Royalty Base Is Improperly Predicated On His Incorrect,
 6 Layman's Understanding of a Single Statement In SonicWall's Annual Cyber
 Threat Reports**

7 Dr. McDuff opined that [REDACTED]
 8 [REDACTED] .” Ex. 1 ¶ 151. Dr. McDuff then identified what he believed to be the “[REDACTED]
 9 [REDACTED] ” (*id.* ¶ 153) based solely on statements in SonicWall's annual Cyber Threat Reports indicating that
 10 SonicWall as a company had collected, *e.g.*, “[REDACTED]” in 2017. *See id.*
 11 ¶ 152 and Attachment J-3 thereto (notes and sources, citing SonicWall's 2018-2020 Cyber Threat
 12 Reports); Ex. 10 at 109:22-114:12; Ex. 27. But the number of “unique malware samples” set forth
 13 in SonicWall's Cyber Threat Report is demonstrably *not* the number of “scans” performed by any
 14 SonicWall product, let alone one very specific product, *i.e.*, Capture ATP. Instead, it represents the
 15 number of malware samples identified generally by the industry, *i.e.*, by SonicWall itself and third
 16 parties. *See* Ex. 28 ¶ 550 (confirming understanding with SonicWall's Alex Dubrovsky).

17 Nor is this question just a battle of experts. Dr. McDuff is not qualified to opine on the actual
 18 number of “scans” that Capture ATP performs for several reasons, and he points to no one else (*i.e.*,
 19 no fact witness or technical expert opinion) to justify this position.

20 *First*, Dr. McDuff does not have the necessary technical expertise that would allow him to
 21 render an expert opinion to calculate (or even approximate) the number of “scans” performed by
 22 Capture ATP. Dr. McDuff admits he has no “formal expertise in computer science” and that he is
 23 not rendering any technical opinions in this case. Ex. 10 at 119:11-120:1. Dr. McDuff further admits
 24 he did not consult with any of Finjan's technical experts to support his non-technical understanding
 25 of the statements in the Cyber Threat Report. *Id.* at 116:2-6. Nor is his interpretation of a statement
 26 in SonicWall's annual Cyber Threat Report a question of economics or damages, which is where Dr.
 27 McDuff's expertise resides. *Id.* at 122:6-123:2. Simply put, Dr. McDuff is not qualified to opine as

1 to his “understanding” that “a unique malware sample” as discussed in the Cyber Threat Report is
 2 the same “kind of scans that are performed by Capture ATP” and accused of infringement here. *Id.*
 3 at 119:4-10.

4 *Second*, Dr. McDuff’s interpretation is directly contradicted by his opinions on other issues.
 5 For example, Dr. McDuff, citing to third-party market research firm Gartner, opined that SonicWall
 6 did not have a sandboxing technology (*i.e.*, Capture ATP) in the market until August 2016, at the
 7 earliest. Ex. 1 ¶ 13 (“.”);
 8 Ex. 10 at 131:15-133:23; Ex. 13 (admitting Capture ATP was not released until summer of 2016). It
 9 would thus be impossible for at least 172 million of the purported “scans” Dr. McDuff calculated
 10 using the Cyber Threat Report from 2014-August 2016—which account for over half of his royalty
 11 base—to represent “scans” performed by Capture ATP (which had not even been released during that
 12 period). Ex. 10 at 123:9-124:18.

13 In sum, Dr. McDuff’s “understanding” as to what the Cyber Threat Reports represented is not
 14 only unsupported by any technical foundation, but it is an area in which he does not possess expertise
 15 to offer an opinion. Further, the opinion he does offer is contradicted by other opinions and citations
 16 to third party market analysis.

17 **D. Conclusion**

18 Dr. McDuff’s Methodology No. 3 is the result of a flawed methodology for calculating a
 19 royalty rate, and an unsupported technical opinion by an economist to calculate the relevant royalty
 20 base. Accordingly, the Court should preclude Dr. McDuff from providing his Method No. 3 opinions.

21
 22
 23 Dated: March 4, 2021

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of **DEFENDANT SONICWALL INC.'S MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF DR. MCDUFF'S PRICE PER SCAN OPINIONS (METHOD NO. 3)** was served by ECF on all counsel of record on March 4, 2021.

/s/ Nicole E. Grigg
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